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Supreme Court, U.S.
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No. 04-510

In The Supreme Court of the United States

ANTHONY RICCARDO,

Petitioner,

v.

LARRY RAUSCH,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Respondent Rausch obscures the important legal questions presented by this case which are dividing the Circuits and which constantly recur in prisoner litigation: How is it determined whether a prison official has sufficient knowledge of a threat to establish "deliberate indifference" under *Farmer v. Brennan*, 511 U.S. 825 (1994)? When is it appropriate for a court of appeals to overturn a jury's verdict that an officer was deliberately indifferent in failing to respond adequately to a serious threat to an inmate's safety?

Since *Farmer v. Brennan* prescribed the "deliberate indifference" standard for Eighth Amendment claims by prisoners, the Circuits have taken varying approaches to these questions and this Court has not returned to the issue. As Judge Williams explained in her dissent to the denial of *en banc* review: "With regard to the Eighth Amendment inquiry, the majority opinion highlights a major gap in the caselaw. Particularly, what is required to prove the objective prong of the deliberate indifference standard?" Appendix to Petition for Writ of Certiorari (hereafter "App.") at 27.

Contrary to Respondent Rausch's assertion, the Seventh Circuit took an approach to these questions which is at odds with other Circuits. In overturning the jury's verdict, Judge Easterbrook's opinion for the court emphasized the absence of statistical evidence proving the reliability of prisoner complaints and the difference between the harm feared (death) and the harm suffered (sexual assault and physical battery). As Judge Ripple explained in a dissent from the denial of *en banc* review joined by three other judges: "Neither of these requirements find support in circuit or Supreme Court precedent." App.

at 22. The Seventh Circuit's approach is a dramatic change in the law, and as Judge Ripple explained: "Requiring the sort of statistical evidence suggested by the panel majority in order to establish the existence of such a risk imposes on inmates a practical burden that is impossible for prisoners to meet." App. at 25.

Respondent Rausch also raises two other grounds for denying review that were not relied on by the Court of Appeals. Neither has merit. First, Rausch argues that there was not proper exhaustion under the Prison Litigation Reform Act, 42 U.S.C. §1997e(a). But as the Seventh Circuit concluded, Riccardo filed a grievance which complained of his being sexually assaulted and beaten and the State of Illinois "accepted and denied the grievance on the merits." App. at 2. Rausch objects to the lack of detail in the grievance, but as the Seventh Circuit noted "this grievance *did* complain that Garcia had committed a rape and that 'the administration don't do there [sic] job.'" App. at 3 (emphasis in original). Thus, the court properly concluded that the exhaustion requirement was met: "If Illinois wants grievances to be more detailed, it must adopt regulations and inform prisoners what is required of them. Riccardo is entitled to a decision on the merits of his constitutional claim." App. at 4.

Second, Rausch argues that qualified immunity bars recovery. But the law is clearly established under *Farmer v. Brennan* that deliberate indifference by prison guards violates the Eighth Amendment. As Judge Williams explained in discussing why Rausch should not be accorded qualified immunity: "It is clear that *Farmer* put prison guards on notice that they have a duty, under the Eighth Amendment, to protect inmates from being gratuitously beaten or raped by other inmates." App. at 21 (Williams, J., dissenting on other grounds).

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A CONFLICT AMONG THE CIRCUITS AND TO CLARIFY AN IMPORTANT ISSUE OF LAW CONCERNING WHAT IS SUFFICIENT TO DEMONSTRATE THAT A PRISON GUARD HAD SUFFICIENT KNOWLEDGE TO BE "DELIBERATELY INDIFFERENT" TO THE RISK OF VIOLENCE.

Rausch argues against review by mischaracterizing the basis for Riccardo's claim of deliberate indifference, the evidence that was before the jury, and the issues presented in this case. Rausch incorrectly asserts that "[Riccardo] wants to impose strict liability on any guard who fears any inmate report of potential harm, even if undisputed evidence shows that there was no objective risk or that the guard subjectively believed that the risk was insubstantial or non-existent." (Brief in Opposition at 16.) Quite the contrary, that is not Riccardo's position and in this case there was much more than that to support the jury's conclusion of deliberate indifference.

When Rausch told Riccardo that he was going to be housed with Garcia, Riccardo immediately objected and informed Rausch that Garcia was a member of the Latin Kings prison gang; that the Latin Kings had "a hit" on Riccardo; that Riccardo feared that his life would be in danger by being placed in a cell with Garcia; and that afternoon another prison guard, Lt. Alemond, chose not to put Garcia and Riccardo together based on this information. (Tr. I, p. 75). This threat was particularly credible because Riccardo was being housed in the receiving unit precisely because of his fear of retaliation by the Latin Kings over a complaint he had filed against one of their members for stealing property from his cell. (Tr. I, pp. 67-68). None of these facts are in dispute.

Moreover, the jury heard *Rausch* testify: "If [Riccardo] would have told me that he feared for his life, if he refused housing or thought that there was a threat to his safety[,] he would not have been placed – they would not have been placed together." (Tr. III, at 73). But what did Rausch do? First, he falsely told Riccardo he had no choice but to accept Garcia as a cellmate (Tr. II, pp. 30-31), even though Illinois prison policy clearly requires that inmates not be celled together if one expresses a fear for safety until the concern can be investigated. (Tr. III, pp. 69-70). Second, Rausch called Riccardo and Garcia together and asked them in front of each other whether they had any problem being celled together. (Tr. I, p. 75). As the district court explained in upholding the jury's verdict: "A jury could have reasonably inferred that Rausch crossed the line from gross negligence to deliberate indifference based on the ludicrousness of 'asking' each inmate if he had a problem in front of the other." App. at 26.

Thus, this case hardly fits Respondent Rausch's characterization of it being a "prisoner's report of potential harm standing alone." (Brief in Opposition at 14.) Indeed, the Seventh Circuit's rejection of this evidence as sufficient evidence to support the jury's verdict of deliberate indifference directly conflicts with the Sixth Circuit's conclusion in *Flint v. Kentucky Dep't of Corrections*, 270 F.3d 340 (6th Cir. 2001), where the failure to respond to a prisoner's complaint was deemed adequate to establish deliberate indifference. Rausch attempts to distinguish this case by claiming that it involved a "plethora of evidence" to bolster the inmate's claim. (Brief in Opposition at 15.) But both cases involved many facts to support the prisoners' concerns; the difference is that the Circuits took very different approaches to defining what is sufficient to establish deliberate indifference.

Moreover, the specific reasons offered by the Seventh Circuit for overturning the jury's verdict conflict with the decisions of other Circuits and necessitates clarification by this Court as to what is sufficient to meet the "deliberate indifference" standard. First, the Seventh Circuit emphasized the lack of statistical evidence in the record concerning the number of murders and sexual assaults at the prison; how many were preceded by requests for protection; how many requests for protection were dishonored, but nothing happened. App. at 10. Rausch attempts to minimize the importance of this aspect of the Seventh Circuit's opinion by stating that the court "merely suggested that statistical data are one way" of proving the objective risk of harm. (Brief in Opposition at 17.) But the Seventh Circuit gave more emphasis than this to the lack of statistical evidence. Judge Easterbrook, writing for the court, declared: "But if violence is rare, or if there is poor correlation between inmates' alarms and subsequent violence, then Riccardo's initial protest would not have provided Rausch with actual knowledge of an impending assault." App. at 10.

As Judge Ripple noted in his dissent from the denial of *en banc* review, this "imposes a new and impossibly high standard of proof for establishing deliberate indifference to prison condition cases." App. at 22. Rausch attempts to distinguish the cases cited by Riccardo which conflict with the Seventh Circuit's decision. *Smith v. Brenoettsy,* 158 F.3d 908 (5th Cir. 1998); *Hamilton v. Leavy*, 117 F.3d 742 (3d Cir. 1997); *Spruce v. Sargent*, 149 F.3d 783 (8th Cir. 1998). But the factual distinctions among the cases should not obscure the basic point that these courts, unlike the Seventh Circuit, said that circumstantial evidence is sufficient to establish deliberate indifference and that statistical evidence is not needed.

Second, the Seventh Circuit stressed that there was not deliberate indifference because the harm Riccardo complained of, his death, was different from the harms he suffered, rape and physical assault. App. at 8. Rausch states: "Petitioner failed to establish deliberate indifference because he failed to show any connection between the risk of harm he told respondent he feared (a Latin King retaliatory 'hit,' however effected) and the harm that occurred (Garcia's sexual assault to fulfill a personal fantasy." (Brief in Opposition, at 20.)

But this misses the point: Riccardo feared physical violence if he was housed with Garcia and expressed this fear to Rausch. Rausch ignored this fear and after placing Riccardo in a cell with Garcia, Riccardo was subjected to physical violence: sexual assault and physical battery.

Again, Rausch points to factual differences between this case and those cited by Riccardo, but none of these distinctions alter the basic point: unlike the Seventh Circuit, several other Circuits have explicitly ruled that a prisoner need not complain of the specific harm suffered in order to show deliberate indifference. *See, e.g., Curry v. Scott,* 249 F.3d 493, 507 (6th Cir. 2001) ("actual knowledge does not require that a prison official know . . . that a particular prisoner would be harmed in a certain way"); *see also Smith v. Brenoettsy*, 158 F.3d at 912 ("we have never held that a supervisory official be warned of the precise act that the subordinate official subsequently commits"); *Calderon-Ortiz v. Laboy-Alvarado*, 300 F.3d 60, 64 (1st Cir. 2002) (a prisoner need not have complained of the specific harm that occurred.)

Simply put, there is significant confusion and conflict among the Circuits as to what is sufficient to establish "deliberate indifference" under *Farmer v. Brennan*. This

Court should grant review to clarify the law and resolve the conflict among the Circuits.

II. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A CONFLICT AMONG THE CIRCUITS AND TO CLARIFY AN IMPORTANT ISSUE OF LAW CONCERNING WHEN IT IS APPROPRIATE FOR A COURT OF APPEALS TO OVERTURN A JURY'S VERDICT THAT A PRISON GUARD WAS SUBJECTIVELY INDIFFERENT TO A PRISONER'S SAFETY AND THUS IS LIABLE FOR THE INJURIES SUFFERED.

The jury in this case found that Rausch was deliberately indifferent and ruled in favor of Riccardo. Rausch then made a motion, pursuant to Rule 50 of the Federal Rules of Civil Procedure for a judgment as a matter of law, based on the insufficiency of the evidence to support the jury's verdict. The district court carefully reviewed all of the evidence, stressed that the credibility of witnesses was crucial, and opined: "[T]here is ample evidence from which to conclude that Rausch's attempt to ascertain the seriousness of the threat was merely pretense, and that because he did not want to go to the extra effort to find different accommodations for Garcia, he recklessly disregarded a dangerous situation. That decision to essentially disregard the threat is where liability lies." App. at 46. The Seventh Circuit, however, overruled the district court and held that "no reasonable jury" could have found deliberate indifference. App. at 9.

Rausch argues that the Seventh Circuit applied well-settled law concerning the standard for overturning jury verdicts under Rule 50. (Brief in Opposition at 24-26.) This, however, ignores that the Seventh Circuit could come to its conclusion only by reweighing the evidence and

making its own evaluation of the credibility of witnesses. As Judge Ripple explained in his dissent from the denial of *en banc* review: "[T]he panel majority ... effectively amends, without any legislative mandate, the standard for judgment as a matter of law under Federal Rule of Civil Procedure 50 for cases brought by prisoners." App. at 22.

The key question dividing the Circuits, and which requires resolution by this Court, is when is it appropriate for a court of appeals to overturn a jury's finding of subjective deliberate indifference in prison cases. Other Circuits have stressed that whether a prison guard is subjectively indifferent is a question for the jury and evidence is not to be reweighed by judges. *See, e.g., Woods v. Lacureux,* 110 F.3d 1215 (6th Cir. 1997); *Giroux v. Somerset County*, 178 F.3d 28, 34 (1st Cir. 1999); *Hayes v. New York City Department of Corrections*, 84 F.3d 614, 621 (2d Cir. 1996).

P[illegible]ttempts to distinguish these cases by arguing that "[illegible] case merely held that the evidence before it was legally sufficient and thus permitted the case to continue to a trial." (Brief in Opposition at 24.) But Rausch misses the point that these cases allowed the matter to be resolved by the jury because of their conclusion that it was for the jury to weigh conflicting evidence, evaluate credibility, and determine whether there was subjective indifference. The Seventh Circuit opinion is in conflict with the other courts because of its very different approach to Rule 50 and its view as to when it is appropriate for a court of appeals to overturn a jury's verdict of deliberate indifference. This Court should grant review to resolve this conflict among the Circuits that constantly arises in appellate review of jury verdicts in prison cases.

III. NEITHER THE PRISON LITIGATION REFORM ACT NOR QUALIFIED IMMUNITY SUPPORT THE SEVENTH CIRCUIT'S DECISION OR PROVIDE A BASIS FOR THIS COURT TO DENY REVIEW.

Rausch raises two additional grounds to support the Seventh Circuit's decision. First, he argues that Riccardo's claim is barred for failure to exhaust administrative remedies as required by the Prison Litigation Reform Act. However, the Seventh Circuit expressly considered this and unanimously concluded, as did the district court, that the exhaustion requirement had been met because Riccardo filed an administrative grievance; that the grievance specifically stated that he had been sexually assaulted; and that the grievance requested action from the prison system. App. at 2-3, 12.

Rausch argues that Riccardo's grievance, which complained of the sexual assault, was not sufficiently specific in complaining about Rausch's conduct or the relief sought. Because §1997e(a) does not provide any rules for prisoners to follow regarding the specificity of grievances, the procedures are determined by the state's grievance procedure. *Strong v. David*, 297 F.3d 646, 649 (7th Cir. 2002). In *Strong*, the court concluded that Illinois law requires only that the grievance "[alert] the prison to the nature of the wrong for which redress is sought." *Id.* Riccardo's grievance obviously did this as it described the assault and trauma that he suffered as a result of being celled with Garcia.

Rausch claims that this is insufficient because Riccardo only was seeking criminal prosecution of Garcia. (Brief in Opposition at 25.) To the contrary, Riccardo's grievance expressly blamed "the administration" of the prison and asked for relief from the prison system. As the Seventh Circuit concluded, this is sufficient for exhaustion:

Riccardo complained of the specific harm he suffered, sexual and physical assault, and asked for relief. App. at 4.

Second, Rausch claims that his actions are protected by qualified immunity. But there is no doubt that as of 1997, when the events giving rise to this lawsuit occurred, it was clearly established that "deliberate indifference" to a prisoner's safety violated the inmate's Eighth Amendment rights. *Farmer v. Brennan*, decided by this Court three years earlier, unequivocally held that deliberate indifference in failing to protect a prisoner from a sexual assault violates the Eighth Amendment. As Judge Williams explained, qualified immunity is unavailable to Rausch because *Farmer v. Brennan* put prison guards on clear notice that they have a duty to protect other inmates from being raped or beaten by other inmates. App. at 21 (Williams, J., dissenting on other grounds).

CONCLUSION

This case presents important questions of law that constantly recur in prison litigation and that have divided the Circuits. This Court should grant review to resolve this conflict and to clarify the law concerning "deliberate indifference" which affects millions of prisons across the country every day.

Respectfully submitted,

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